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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

HARMON WESLEY SHIELDS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Does the Fourth Amendment, U.S. Constitution, or the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510 *et seq.*, prohibit the F.B.I., with the help of a paid informer and using F.B.I. equipment, from intercepting without a warrant or court order conversations of petitioner in petitioner's home, in his office, and in the woods with a third party who had hired the informer to help him record petitioner's words for purposes of blackmail?

PARTIES TO PROCEEDINGS IN THE COURT BELOW

The United States, as plaintiff-appellee, and petitioner Harmon Wesley Shields plus Jack Vernon Quick, as defendants-appellants, were the only parties to the proceeding in the U.S. Court of Appeals for the Eleventh Circuit below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
REFERENCE TO OPINIONS BELOW	1
GROUNDS FOR JURISDICTION OF THIS COURT	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT FOR ALLOWANCE OF WRIT	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8
APPENDIX:	
Appendix A—Judgment of the U.S. District Court for the Northern District of Florida below	1a
Appendix B—Judgment and Opinion of the U.S. Court of Appeals for the Eleventh Circuit below	3a
Appendix C—Constitutional Provisions and Statutes Involved:	
Fourth Amendment, U.S. Constitution	18a
The Hobbs Act, 18 U.S.C., Section 1951	18a
Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510-2520 (portions thereof)	19a
18 U.S.C., Section 3504	22a

TABLE OF AUTHORITIES

CASES CITED:	Page
Katz v. *United States*, 389 U.S. 347 (1967)	6, 7
Lewis v. *United States*, 385 U.S. 206 (1966)	5
Lopez v. *United States*, 373 U.S. 427 (1963)	5
Mincey v. *Arizona*, 437 U.S. 385	7
On Lee v. *United States*, 343 U.S. 747 (1952)	5
United States v. *Caceres*, 440 U.S. 741 (1979)	5
United States v. *Ross*, ___ U.S. ___, 50 L.W. 4580 (1982)	7
United States v. *Turk*, 526 F.2d 654 (5th Cir.), cert. den., 429 U.S. 823 (1976)	6
United States v. *White*, 401 U.S. 745 (1971)	5
Walter v. *United States*, 447 U.S. 649 (1980)	6
CONSTITUTION & STATUTES:	
Fourth Amendment, U.S. Constitution	i, 2, 5
The Hobbs Act, 18 U.S.C. § 1951	2
Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*	i, 2, 5
18 U.S.C. § 2511(2)(c)	2, 5
18 U.S.C. § 2511(2)(d)	2, 5
18 U.S.C. § 3504	2
18 U.S.C. § 3772	1
28 U.S.C. § 1254(1)	1
Rule 20.1-20.4, Rules of Supreme Court of the United States	1

IN THE

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OCTOBER TERM, 1981

No. ____

HARMAN WESLEY SHIELDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REFERENCE TO OPINIONS BELOW

The judgment of the U.S. District Court for the Northern District of Florida is not reported and appears in Appendix A, *infra*. The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, ____ F.2d ____, rendered May 10, 1982, appears in Appendix B, *infra*.

GROUNDS FOR JURISDICTION OF THIS COURT

The judgment and opinion of the U.S. Court of Appeals below is dated and was entered May 10, 1982. See Appendix B, *infra*.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1); 18 U.S.C., Section 3772; and Rule 20.1-20.4, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fourth Amendment, U.S. Constitution; the Hobbs Act, 18 U.S.C., Section 1951; the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Sections 2510-2520 (especially Sections 2511(2)(c) and 2511(2)(d)); and 18 U.S.C., Section 3504. These provisions appear in Appendix C, *infra*.

STATEMENT OF THE CASE

Petitioner, a Florida state official, and his co-defendant Jack Vernon Quick were convicted in the U.S. District Court for the Northern District of Florida of conspiring and attempting to extort money in violation of the Hobbs Act, 18 U.S.C., Section 1951, from a real estate broker who was trying to sell land to the State of Florida. The principal evidence against the defendants were tapes of conversations between the defendants which took place in petitioner's home, in his office, and in a remote place in the woods near Tallahassee. No money actually changed hands, and petitioner's defense that he was leading co-defendant Quick on in order to catch him and the broker in a bribery violation was rejected by the jury. Defendants' motions to suppress the tapes, based on the Fourth Amendment and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Section 2510 *et seq.*, were denied.

The underlying facts of the interceptions are not in dispute. Real estate broker McIver hired Quick, also a broker, to approach petitioner Shields to act favorably on the proposed sales of two parcels of land to the State of Florida, which sales would entail broker's fees for McIver in excess of $1,000,000.00. Quick reported to McIver that Shields was demanding a payoff. Quick then hired a private detective, Andrews, to help him get tape recordings of Shields' oral statements for the purpose of blackmailing Shields so Shields would not renege on the pending deals and could be forced into future corrupt deals.

Unbeknownst to Quick, the detective Andrews went to the F.B.I. and became a paid informer or agent. When Quick planned a meeting with Shields, he would call Andrews—usually a day or so in advance—to wire him up with a recorder and transmitter. Andrews would then call the F.B.I., and on the appointed day would meet with the F.B.I. to obtain an F.B.I.-owned body recorder, tape and a body radio transmitter. Andrews then took this equipment to Quick's office where he rigged it on Quick's body, taping the starter switches in the "on" position. Quick would then proceed, alone, to Sheilds' home or office. Quick's conversations with Shields would thereby be both recorded and transmitted. But Andrews would never over-hear the conversations. Only the F.B.I. listened to the transmissions on their car radios.

After the meetings with Shields, Quick would return to his office where Andrews would meet him, take off the equipment and tape, and unbeknownst to Quick, deliver the equipment and tape back to the F.B.I. The F.B.I. then separated from Andrews, listened to the tape, and made two cassette copies which it subsequently gave to Andrews. Andrews kept one copy and gave the other to Quick for use in blackmailing Shields.

It is clear that Andrews was never present at any meeting between Quick and Shields—nor did he ever over-hear any conversations between Quick and Shields. As Andrews testified: [1]

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[1] The record in this case consists of 18 volumes. The first three volumes are paged consecutively and consist of pleadings and orders and the evidentiary hearing on the motions to suppress the tapes. Reference to these three volumes will be made by the symbol "R" with the appropriate page number (e.g., R. 235). The remaining 15 volumes consist of the trial transcript, each volume of which is paged individually. Reference to these volumes will be by the symbol "T" followed by the appropriate volume and page number (e.g., T. Vol. 5, p. 235).

"When Mr. Quick had requested it, I provided him with this equipment, *and he was going to record the conversation.*"
(T. Vol. 9, p. 63; emphasis added.)

* * *

"Well, I don't know what Mr. Quick and Mr. Shields said. * * *"
(T. Vol. 9, p. 83.)

* * *

"Q. In other words, Agent Ramsey had the receivor . . .

"A. (Interposing) Excuse me. You asked me about the transmitter. The transmitter was on Mr. Quick.

"Q. Right.

"A. . . . And it was transmitting a radio signal that I assumed was being received by the Bureau car.

"Q. Certainly not to you?

"A. No, sir. But you asked me . . .

"Q. *You were not part of the interception; is that correct?*

"A. *That is correct.*"
(R. 425; emphasis added.)

* * *

"Q. You actually never overheard any conversations between Quick and Shields?

"A. As it was taking place?

"Q. Yes, sir.

"A. No, sir."
(R. 431)

It is clear that there were no exigent circumstances, and that on each occasion the F.B.I. had ample time and opportunity to seek a warrant or court order authorizing the interceptions. The Government offered no explanation for not doing so; in fact, F.B.I. agent Ramsey testified he was "in the process of applying for a court order in connection with this matter (T. Vol. 10, p. 31; Vol. 14, p. 68) as did also Government attorney

James as, he said, "the next logical step" in the investigation (T. Vol. 14, pp. 96-98).

The whole investigation aborted and arrests were made on the conspiracy and attempt charges when informer Andrews told the press about the tapes and played the tapes for at least one reporter (R. 437-454).

ARGUMENT FOR ALLOWANCE OF WRIT

This case presents important questions concerning the application of both the Fourth Amendment and the Omnibus Crime Control and Safe Streets Act of 1968 ("the Act"), 18 U.S.C., Sections 2510-2520, to the Government's warrantless interception of private conversations in the home and in the office. The legion of cases involving the "consent" provisions of the Act, 18 U.S.C., Sections 2511(2)(c) and (2)(d), demonstrates the Government's heavy reliance on these narrow exceptions to the Act's broad and general requirement for a court order authorizing Government interception of private conversations. But this case goes far beyond any prior case based on the "consent" provisions of the Act. Here, petitioner Shields was not talking to an undercover agent or an informer. See, e.g., *United States* v. *Caceres*, 440 U.S. 741 (1979); *United States* v. *White*, 401 U.S. 745 (1971); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952). He was talking to a blackmailer. And 18 U.S.C., Section 2511(2)(d), of the Act expressly makes interceptions by blackmailers illegal and prohibits use of such interceptions as evidence. 18 U.S.C., Section 2515.

Here, it is respectfully submitted, a blackmailer (Quick) was intercepting Shields' oral communications without Shields' knowledge or consent, and the F.B.I. was intercepting both Quick and Shields' oral communications without the consent of either one and without a court order or warrant. Unless one resorts to some sort of doctrine of quasi-consent or transferred-consent or implied-consent, as distinguished from plain actual consent, it is patent and clear that Quick did not

consent to the F.B.I.'s interception of his conversations. Indeed, the notion that he did is staggering when one reflects upon his illegal purpose in making the interceptions.

It is true that the District Court below found as a "fact" that Andrews did the intercepting, and the Court of Appeals sustained this "finding of fact" as not being clearly erroneous. But it is submitted that this finding is more in the nature of a conclusion than it is a finding of basic fact, and in any event in view of the admitted facts and Andrews' testimony as quoted above, it *is* clearly erroneous.

The Court of Appeals also concluded that, "We need not decide whether the interceptions through the reception of radio transmissions were legal" (slip opinion, p. 1149; Appendix B *infra*, p. 11a). But this ignores the fact that Andrews, who did not over-hear any conversations between Quick and Shields, could not authenticate the tapes at the suppression hearing, and that the testimony of the F.B.I. agents who did over-hear the radio transmissions was necessary for this purpose.

Finally, to construe the Act as the Court of Appeals did, raises serious questions concerning the Act's constitutionality under the Fourth Amendment as applied to the facts of this case. See *Katz* v. *United States*, 389 U.S. 347 (1967). Moreover, once the F.B.I. came into possession of the tapes, by conduit from the blackmailer, the teaching of *Walter* v. *United States*, 447 U.S. 649 (1980), argues that a warrant or court order should then have been obtained before playing or "opening" the tapes. See *United States* v. *Turk*, 526 F.2d 654 (5th Cir.), cert. den., 429 U.S. 823 (1976).

As the Court of Appeals in this case stated (slip opinion, p. 1147; Appendix B, *infra*, p. 8a):

> "Because express consent to the FBI's actions was given only by Andrews, who was not a party to the conversations, this case raises difficult questions."

The answer to these difficult questions, it is submitted, lies in this Court's recent statement in *United States* v. *Ross*, ___ U.S. ____, 50 L. W. 4580, 4587 (June 1, 1982):

> "We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U.S. 385, 390:
>
> 'The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (footnotes omitted).' "

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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July, 1982

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served by mail this ___ day of July, 1982, upon the Honorable Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for respondent.

_____

Of Counsel

APPENDIX A

JUDGMENT AND PROBATION/COMMITMENT ORDER OF U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

HARMON WESLEY SHIELDS

Docket No. TCR 80-00710

September 19, 1980

Counsel: Defendant appeared with counsel Carlton Maddox.

Plea: Defendant pled Not Guilty.

Verdict: There being a verdict of Guilty.

Finding & Judgment: Defendant has been convicted as charged of the offenses of from on or about March 10, 1978, to and including on or about January 23, 1979, in the Northern District of Florida, conspiring to obstruct, delay and affect, and the movement of articles, commodities and monies in such commerce by extortion, in violation of Title 18, United States Code, Sections 1951 and 2, as charged in a 3 count Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment on count 1 for a period of five (5) years and fined the sum of $10,000. Defendant shall become eligible for parole under Title 18, United States Code, Section 4205 (b)(1) upon serving a term of one (1) year. Defendant shall stand committed until the fine is paid or otherwise discharged by due course of law.

On count 2, that the defendant is hereby committed to the custody of the Attorney General or his authorized representa-

tive for imprisonment for a term of five (5) years and fined the sum of $10,000. Defendant shall become eligible for parole under Title 18, United States Code, Section 4205 (b)(1) upon serving a term of one (1) year. Defendant shall stand committed until the fine is paid or otherwise discharged by due course of law. Said sentence to run concurrently with sentence imposed in count 1 as to imprisonment only.

On count 3, that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of five (5) years and fined the sum of $10,000. Defendant shall become eligible for parole under Title 18, United States Code, Section 4205 (b)(1) upon serving a term of one (1) year. Defendant shall stand committed until the fine is paid or otherwise discharged by due course of law. Said sentence to run concurrently with sentence imposed in counts 1 and 2 as to imprisonment only.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends,

(no recommendation)

Signed By: /s/ William Stafford
WILLIAM STAFFORD
United States District Judge

Date: 9/30/80

Filed: 1980 SEP 30 PM 4:10

APPENDIX B

JUDGMENT AND OPINION OF U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

v.

Harmon Wesley SHIELDS & Jack Vernon Quick,
Defendants-Appellants.

No. 80-5755.

United States Court of Appeals,
Eleventh Circuit.

May 10, 1982.

Defendants were convicted in the United States District Court for the Northern District of Florida, William Stafford, Chief Judge, of conspiracy to obstruct interstate commerce by extortion and attempting to commit the substantive offense, and they appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) conversations recorded by private detective at request of one of the defendants was admissible even though he was unaware that the detective was cooperating with the FBI; (2) District Court's failure to have ordered disclosure of Government interview with witness, if error, was harmless; and (3) evidence was sufficient to sustain defendants' convictions.

Affirmed.

Appeals from the United States District Court for the Northern District of Florida.

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Appellants Harmon Shields and Jack Quick were convicted by a jury on one count of conspiracy to obstruct interstate

commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951, and on two counts of attempting to commit the substantive offense, in violation of 18 U.S.C. §§ 1951 and 1952. On appeal, they contend certain evidence was improperly admitted, assert a *Brady* violation, and challenge the sufficiency of the evidence on which they were found guilty. After careful consideration of their contentions, we affirm their convictions.

I. The Facts

In order to acquire tracts of land for parks and environmental preserves, the State of Florida adopted the Environmental Endangered Lands Program. Before land could be purchased by the state under this program, Florida's Interagency Advisory Committee ("IAC") had to recommend the purchase to the governor and his cabinet. Appellant Shields, as executive director of the Florida Department of Natural Resources, served as chairman of the IAC and thus had considerable influence over which prospects would be recommended for acquisition and which ones would be rejected. Appellant Quick, a real estate broker, was a friend of Shields.

In 1978, A Tallahassee real estate broker named Bruce McIver hoped to arrange the sale of two large parcels of land to the state. One tract was known as Seminole Ranch and the other as Big Talbot Long Island. In March, McIver solicited Quick to ask Shields to recommend him as a broker to the owners of the Seminole Ranch property. Quick arranged for McIver to meet with Shields, and Shields agreed to help McIver as requested. A few weeks later, McIver agreed to pay Quick $100,000 as a real estate commission if he obtained the right to sell the Seminole Ranch tract to Florida. He obtained that right in May and stood to make a $960,000 commission if the sale went through.

In August, the IAC met and voted to recommend to the governor and the cabinet that the state acquire Seminole Ranch. Shields' deputy in the Department of Natural Re-

sources testified that Shields instructed him before this meeting to recommend to the IAC, on behalf of the Department, that the state purchase the property. A week after the meeting, Shields summoned McIver to his office and told him that he wanted McIver to hire an individual named John Tanner to show the Seminole property to an appraiser and to do other tasks related to selling the land. McIver agreed to do so.

In September, the governor and the cabinet agreed to accept the IAC's recommendation. Shortly therafter, Quick informed McIver that Shields wanted half of McIver's commission on the Seminole Ranch sale. McIver resisted. Quick then warned McIver that Shields would stop the sale if McIver did not agree to make the payment, and Quick also announced that Shields had said that McIver's other project, Big Talbot Island, was "dead." The next few weeks saw a series of meetings between Quick and Shields and between Quick and McIver. Quick told McIver that Shields was demanding $200,000 when Seminole Ranch was purchased by the state and $35,000 when Big Talbot was acquired. McIver never talked directly with Shields about the demands conveyed to him.

The plot thickened when Quick hired a private detective, Gene Andrews, to help him get tape recordings of his conversations with Shields. Quick's purpose in wanting to record the conversations was to ensure that Shields would live up to his agreements on the land deals then taking place and to blackmail Shields to participate in future corrupt land deals or payoffs. Andrews told Quick that he probably could provide tape recording equipment to be worn on Quick's body. Subsequently, Andrews reported Quick's request to an FBI agent who instructed Andrews to agree to the request and said that the FBI would provide recording equipment.

On November 6, 1978, the FBI provided Andrews with two pieces of equipment: a body tape recorder and a radio transmitter. Andrews took the equipment to Quick's office. Quick removed his coat and vest and Andrews installed the tape recorder and the transmitter in a concealed position on Quick's body.

Andrews told Quick to wear the transmitter so that Andrews could overhear the conversation as it was occurring so that he could come to Quick's assistance should Shields discover the bug. When Quick was ready to leave for his meeting with Shields, Andrews activated the tape recorder and taped the switch in the "on" position. Quick proceeded to Shields' office where their conversation was recorded. The FBI, but not Andrews, listened in on the coversation as it was received from the transmitter. When Quick returned to his own office, Andrews turned off the recorder, removed the recorder and the transmitter from Quick's body, and left. He then returned the equipment to the FBI. An FBI agent took the equipment to his office where he listened to the original tape and made two cassette copies. The agent later gave Andrews the copies, one to keep and one to give to Quick.

In the meeting which was recorded, Shields demanded half of the $100,000 which McIver had agreed to pay Quick. Shields complained that he was not getting enough money for the risk he was taking, and Quick assured Shields that McIver did not know that Shields was to receive a portion of the money that McIver had agreed to pay Quick.

On November 14, Quick again recorded conversation with Shields with equipment supplied and operated by Andrews. In this meeting, which took place in Shields' home, Quick told Shields that McIver was "desperate" because he was afraid that the purchase of Big Talbot Island would fall through. Shields told Quick that the Big Talbot Island property was not on the agenda for the IAC meeting the next day and that he intended to "try to help [McIver] with that" provided the appraisals of the land were satisfactory. Shields agreed to call his deputy in the Department of Natural Resources and instruct him that if the appraisal on Big Talbot was "in the ballpark," the IAC should recommend that the state purchase the property.

Sometime in November, 1978, McIver heard from Richard Pelham, his business associate, that Shields wanted $100,000

to facilitate the sale of Big Talbot Island. Pelham testified that Shields had asked him to give this message to McIver and had indicated the amount by a hand gesture. After receiving the message from Pelham, McIver met with Quick, told him of the message, and stated that he could not afford to pay Shields. During his conversation, McIver telephoned Shields and said he wanted to meet with him and discuss the message sent through Pelham. Shields responded that he would only meet with Quick.

Quick and McIver then drove to Shields' office building, and McIver waited in the car while Quick met alone with Shields. Thirty minutes later, Quick returned and told McIver that Shields wanted some money from him. McIver told Quick that he could not afford to pay Shields anything. Quick first suggested that McIver pay Shields $10,000 in $100 bills immediately. After further conversation, Quick asked if McIver could afford $25,000. McIver again responded that he could not afford to pay Shields anything. Quick went again to Shields' office, returned, and told McIver that Shields had said that unless McIver gave him $35,000 he would kill the Big Talbot Island sale before the IAC met again. Quick told McIver that the two were to drive off if McIver agreed to this demand, and they did so.

On December 14, 1978, the IAC met. The Committee voted to recommend Big Talbot Island to the governor and his cabinet for purchase by the state.

Quick and Andrews repeated their recording procedure on January 16, 1979. Andrews once again provided Quick with a body recorder and a transmitter, and conversations between Quick and Shields were recorded in Shields' office, his car, a restaurant, and a wooded area. FBI agents heard over their car radio the transmissions of the conversations made in the restaurant and in the woods. The conversation in the country took place because Shields was worried that the FBI was "damned sure on this case" and believed that the FBI might have placed a recording device in his office. Shields told Quick

that they should no longer meet or converse over the telephone unless they had legitimate business to transact. After this meeting with Shields, Quick warned McIver that Shields had told him that the FBI was investigating the case. Quick then told McIver not to call Shields any more and not to tell any one about any requests for money.

Big Talbot Island and Seminole Ranch were never purchased by the State of Florida. After Florida newspapers learned of the FBI's investigation, the state stopped the purchase of all land under the program.

II. Admissibility of the Intercepted Conversations

The government stipulated at trial that no warrant or other judicial authorization was ever issued for any of the interceptions of the conversations between Quick and Shields on November 6, November 14, and January 16. Appellant Shields claims that the interceptions were illegal and inadmissible under the Omnibus Crime Control Act. He further maintains that the evidence of the conversations should be suppressed on the grounds that the FBI agents violated his fourth amendment rights by (1) playing and listening to the tapes which Andrews had given the agents and (2) intercepting Shields' conversations in his home, in his office, and elsewhere through the use of the radio transmitter. Because express consent to the FBI's actions was given only by Andrews, who was not a party to the conversations, this case raises difficult questions.

A. The Omnibus Crime Control Act

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20 ("the Act") prohibits the electronic interception of "oral communications" except under certain circumstances and provides that the contents of conversations intercepted in violation of the Act may not be received in evidence in any court proceeding. *See* §§ 2511 and 2515. The legality of the interceptions involved here turns on the con-

struction and application of § 2511(2)(c), a consensual exception to the Act's broad proscription. [1] That subsection states:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Whether the requirements of § 2511(2)(c) were met thus depends upon (1) what acts constituted interceptions of the conversations between Quick and Shields, (2) who was responsible for each interception, (3) whether that person was acting under color of law, and (4) whether that person was a party to the communication or whether there was consent to the interception by a party.

The Act defines "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Under this definition, each communication in question was intercepted twice. One "aural acquisition" occurred when the agents heard the conversation being transmitted by radio. The other involved the tape recording and occurred at the time the recording was made, not when persons listened to the tape. *United States* v. *Turk*, 526 F.2d 654, 658 (5th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976).

In ruling on the motion to suppress, the district court determined that the tape recording was an interception by Andrews. That finding was based upon the district court's conclusion that "the recording . . . equipment came to be on defendant Quick's person as a result of Quick's explicit request that Mr. Andrews assist him with acquiring such electronic paraphernalia as was necessary for Andrews to record said conversations." Appellant Shields argues, however, that Quick intercepted the conversations by making the tapes and

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[1] The government does not argue that any other exceptions in the Act apply.

that the evidence is inadmissible under § 2511(2)(c) because Quick was not acting under color of law.

[1] The district court's determination of who intercepted the conversations was a finding of fact. As such, it must be upheld unless we find it clearly erroneous. See generally McCormick's Handbook of the Law of Evidence § 53 (2d ed. 1972).

[2] We find that the record sufficiently supports the district court's view of the events. Andrews' testimony at the suppression hearing indicates that he, not Quick, controlled the recording equipment. Andrews installed the recorder, turned it on, and taped the switch in the "on" position. After the conversation, he removed the equipment and turned off the recorder. Though the recording was apparently done at Quick's request, and though Quick wore the recorder, Andrews did the recording. He used Quick's body as the means of inserting the equipment into the presence of the coversationalists; Quick's request would have been granted had Andrews arranged for the recorder's and the transmitter's presence in any other acceptable way.

[3] Courts have repeatedly held that informants who tape-record private conversations at the direction of government investigators are "acting under color of law" within the meaning of subsection (c). *See, e.g., United States* v. *Mendoza*, 574 F.2d 1373, 1377 (5th Cir.), *cert. denied*, 439 U.S. 988, 99 S.Ct. 584, 58 L.Ed.2d 661 (1978); *United States* v. *Ransom*, 515 F.2d 885, 889 (5th Cir. 1975), *cert. denied*, 424 U.S. 944, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *United States* v. *Craig*, 573 F.2d 455, 476 (7th Cir. 1977); *United States* v. *Rich*, 518 F.2d 980, 985 (8th Cir. 1975). Consequently, it seems clear—and Shields apparently admits—that Andrews was acting under color of law when he recorded the conversations here.

[4] The remaining inquiry is whether Quick consented to the interception within the meaning of § 2511(2)(c). The legislative history explains the consensual exception as follows: "It shall not be unlawful for a party to any wire or oral

communication or a person given prior authority by a party to a communication to intercept such communication." S.R.No.1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. and Ad.News 2112, 2182. Since Andrews' activities were invited, he did have "prior authority" to make the interception. [2] Also, the requirement that the consent be voluntary is satisfied in this case. *See United States* v. *Juarez*, 573 F.2d 267, 278 (5th Cir. 1978).

We find, then, that the recordings were legal interceptions and that the taped evidence of the conversations was admissible. We need not decide whether the interceptions through the reception of radio transmissions were legal. [3]

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[2] Obviously, as the government points out, a party to a conversation who has consented to its interception need not authorize further its being divulged. "If consent has been given prior to the original interception, no additional consent is necessary before the information can be used or admitted into evidence." J. Carr, The Law of Electronic Surveillance 91 (1977).

Nor does it matter that Quick was unaware that Andrews was cooperating with the FBI. As indicated by Supreme Court decisions in the context of fourth amendment claims, "consent is not vitiated merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the other person's identity as a police officer or police agent." W. LaFave, [2] Search and Seizure 680 (1978).

[3] Since we do not reach this question, we avoid a sticky issue of statutory interpretation, the meaning of "such interception" under § 2511(2)(c). The district court found, and the parties agree, that in the instance of each transmission of the defendants' conversations, there was an interception by the FBI agents who listened over the radio. As Shields points out, Quick did not expressly consent to this particular interception. He did, however, authorize transmission of the conversations over the airways and authorize Andrews to listen. He thus consented to *an* interception. The issue that would be raised by these facts is whether such consent is sufficient for the interception to be deemed legal under § 2511(2)(c). This issue might be seen as

B. The Fourth Amendment

Appellant Shields contends that evidence of the content of his conversations with Quick should be excluded because the government violated his fourth amendment rights in two ways. First, with regard to the interception of the conversations, Shields maintains that his rights were violated when the FBI, without a warrant and without Shields' consent, acted through Andrews to place a transmitter and a recorder inside Shields' home, in his office, and in a field.

[5] Contrary to the tone of Shields' argument, "the Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). The location of the conversations that were intercepted is not determative; the proper inquiry is whether the government's activities in electronically listening to and recording the conversations violated privacy upon which Shields justifiably relied. *See id.* at 353, 88 S.Ct. at 512; *United States* v. *White*, 401 U.S. 745, 752, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).

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a question of how far Quick's consent extends. *See United States* v. *San Martin*, 469 F.2d 5, 7 (2d Cir. 1962).

One could argue that the legislative history quoted earlier suggests that the statute should be read to confer legality only upon an interception by the person authorized to listen or record. However, consent might be implied under the facts here. Andrews was authorized to listen and merely designated others to act for him. Since a party to the conversation consented to interception by a hidden listener, there was no intrusion into a conversation which was intended by both parties to be private. The policy grounds upon which § 2511(c)(2) was based would thus seem to be met. Also we note that these facts would be distinguishable from a situation where an unauthorized person listened in on a conversation without the consent of a person who had been authorized to listen, *i.e.*, where there were two distinct interceptions.

[6] Supreme Court cases have consistently held that the government does not violate the fourth amendment by recording and transmitting private conversations with the consent of one of the parties, even though the other party does not know his conversation is being recorded or transmitted. *See United States* v. *Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *United States* v. *White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); *Lewis* v. *United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *Hoffa* v. *United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lopez* v. *United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee* v. *United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). "The principle underlying them is that when one reveals information to an individual, one takes the risk that one's confidence in that individual is misplaced." *Flaherty* v. *Arkansas*, 415 U.S. 995, 999, 94 S.Ct. 1599, 1601, 39 L.Ed.2d 893 (1974) (Douglas, J., dissenting from denial of certiorari). Since the fourth amendment affords no protection "to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," *Hoffa* v. *United States*, 385 U.S. at 302, 87 S.Ct. at 413, the government's warrantless interceptions involved no violations of justifiable expectations of privacy. Those cases have arisen where a party was an informant or agent, a slightly different context than we have here. Nonetheless, they have focused on constitutionally justifiable expectations of privacy, as we must do, and they control this decision.

[7] Here, Quick was in Shields' home and office with Shields' consent, if not his invitation. *Cf. Lopez* v. *United States*, 373 U.S. 427, 438, 83 S.Ct. 1381, 1387, 10 L.Ed.2d 462 (1963) (approving agent's recording of conversation in another's office). Quick, as party to the conservation, wore the recorder and the transmitter; the equipment was not placed on Shields' premises. Compare *United States* v. *Padilla*, 520 F.2d 526 (1st Cir. 1975) (disapproving recording of conversation with agent where microphone had been placed in hotel room). Shields knowingly placed his trust in Quick by conversing with

him, taking the risk that Quick would not convey the content of the conversations to others either then or later. *See United States* v. *White*, 401 U.S. at 751-52, 91 S.Ct. at 1125-26. True, Quick did not expressly authorize an interception by government agents; however, Shields' contentions fare no better simply because his confidante instead authorized the interception of the conversation by a confederate who turned out to be a government informer. There was still no governmental intrusion into a conversation which was intended by both parties to be private. Under these circumstances, the government's interception did not violate Shields' justifiable expectations of privacy.

Shields also contends that the government violated his fourth amendment rights by the agents' playing and listening to the tapes which Andrews gave them without first obtaining a warrant. In support of his contention, Shields cites *United States* v. *Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976); *Robbins* v. *California*, ___ U.S. ___, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), (plurality opinion), and *Walter* v. *United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).

In *Turk*, a tape recording of a conversation between Turk and another party was seized when the other party was lawfully arrested. The Fifth Circuit held that the warrantless playing of the tape by law enforcement officers after it was seized was improper.

Similarly, *Robbins* involved a warrantless opening of a closed paper bag found in the luggage compartment of a car which had been stopped and was being lawfully searched. The court announced, in a plurality opinion, that the opening of the closed container violated the fourth and fourteenth amendments. [4]

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[4] When granting certiorari in *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir. 1981), *cert. granted*, ___ U.S. ___, 102 S.Ct. ___, 72

Walter involved warrantless screening of obscene films which had been turned over to the FBI by a private party who had received the films through an innocent miscarriage of shipment. The court determined that the screening was an unreasonable search.

The case before us is fundamentally different from the cases cited by appellant Shields. In none of those cases did the government obtain consent to the search from anyone who had the right to control or use the item in question because of ownership or possession of the item with the knowledge of the owner. Other authority controls here.

The Supreme Court has upheld the validity of searches conducted upon the consent of a third party where that party has a sufficient relationship to the property which has been searched. *See Frazier* v. *Cupp*, 394 U.S. 731, 740, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684 (1969) (joint user of a dufflebag). In *United States* v. *Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), the Court explained that warrantless searches are constitutional where "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 172, 94 S.Ct. at 993. "The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes . . ." *Id.* n.7.

[8] Here, Andrews had the right to use the tape. He had supplied the taping equipment for Quick at Quick's request. He had recorded the conversation, and had purportedly taken the original tape with Quick's consent to make copies. Furthermore, Quick knew that Andrews had retained his own tape

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L.Ed.2d ____, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981), the Court directed the parties to address whether the Court should reconsider *Robbins*.

even after Quick had received his recording of each conversation. The interest which Andrews had in the tape was unquestionably sufficient to enable him to authorize the government's listening to the recorded conversation.

III. The *Brady* Issue and Sufficiency of the Evidence

McIver was interviewed by the FBI on January 23, 1979, and appeared before a grand jury on January 25. He was later granted immunity, was interviewed again by the FBI in May and June, and appeared before a grand jury on June 7. Quick asserted that the FBI report of its initial interview with McIver constituted *Brady* [5] material to which he was entitled and without which he was denied fair trial. The district court, after examining the report *in camera*, refused to order the government to furnish the material.

Quick points out several specific areas in which both the initial grand jury testimony and the first FBI statements are inconsistent with McIver's trial testimony. The initial grand jury testimony was available to Quick and was used at trial for impeachment, but Quick contends that the FBI report was nevertheless necessary to his defense. He maintains that statements to the FBI are more thorough and lengthy than grand jury testimony, so that the report has greater weight. Quick further argues that because the tape recordings are subject to the interpretation that there was only a bribe involved, [6] the failure to order that the FBI's report be furnished to him cannot be harmless error.

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[5] *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[6] Under the theory on which this case was brought, McIver was the victim of extortion. It was Quick's defense, however, that McIver and Quick had conspired to bribe Shields and that there was no extortion involved.

[9] We reject Quick's contentions. As impeachment evidence, the statements to the FBI are cumulative with the initial grand jury testimony. After examining the content of the report, we do not believe that the statements could have been used to impeach McIver in any way that the defense did not already know about and have the opportunity to exploit. What was sought to be proven regarding credibility was proven. Since the appellants were properly allowed to show that McIver had given sworn inconsistent statements prior to the trial, the jury knew that McIver had persisted in a version of the transaction different from the version he gave after he was granted immunity. The mere fact that he had also given the earlier version to investigating agents would not have added a feather's weight to the impeachment effort. The district court's failure to have ordered disclosure, if error, was harmless since the report could not have "affected the outcome of the trial." *See United States* v. *Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). *See generally Monroe* v. *Blackburn*, 607 F.2d 148, 150 (5th Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S.Ct. 2929, 64 L.Ed.2d 816 (1979). Nonetheless, we are disappointed in the government's refusal to disclose the information upon Quick's specific request. We note that the *Brady* rule requires disclosure of all material evidence favorable to a defendent, and we caution the government that such materials should not be sparingly produced.

[10] Finally, the appellants challenge the sufficiency of the evidence. After reviewing the record, we determine that the relevant evidence, viewed in the light most favorable to the government, could be accepted by a reasonably minded jury as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. [7] Accordingly, the convictions are

AFFIRMED.

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[7] *See generally United States* v. *Burns*, 597 F.2d 939, 941 (5th Cir. 1979) (discussing the formulations of the standard used to assess the sufficiency of evidence).

APPENDIX C

Constitutional and Statutory Provisions Involved

1. *Fourth Amendment*, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. *The Hobbs Act*, 18 U.S.C., Section 1951:

"Section 1951. *Interference with commerce by threats or violence.*

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within

the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-166 of Title 29 or sections 151-188 of Title 45."

(June 25, 1948, c. 645, 62 Stat. 793; June 18, 1934, c. 569, 48 Stat. 979.)

3. *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C., Sections 2510-2520 (portions thereof):

"Section 2510. *Definitions.*

* * *

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

* * *

"(4) 'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

"(a) * * *

"(b) * * *

"(6) 'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

"(7) 'Investigative or law enforcement officer' means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"(8) 'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

* * *

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

"Section 2511. *Interception and disclosure of wire or oral communications prohibited.*

"(1) Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

"(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

"(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

"(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

"(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

"(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

"(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

"(2)(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of laws of the United States or of any State or for the purpose of committing any other injurious act.

"Section 2512. *Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.*

"(1) Except as otherwise specifically provided in this chapter, any person who willfully—

"(a) * * *

"(b) * * * possesses * * * any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) * * *

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"Section 2513. * * *

"Section 2514. Repealed.

"Section 2515. *Prohibition of use as evidence of intercepted wire or oral communications.*

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

"Sections 2516-2520. * * *."

(Pub. L. 90-351, Title III, June 19, 1968, 82 Stat. 212; as amended Pub. L. 91-358, Title II, July 29, 1970, 84 Stat. 654; as amended Pub. L. 91-452, Title II, Title VIII, Title IX, and Title XI, Oct. 15, 1970, 84 Stat. 930, 940, 947, 959; as amended Pub. L. 91-644, Title IV, Jan. 2, 1971, 84 Stat. 1891; as amended Pub. L. 95-511, Title II, Oct. 25, 1978, 92 Stat. 1796-1798; as amended Pub. L. 95-598, Title III, 1978, 92 Stat. 2677.)

4. 18 U.S.C., Section 3504. *Litigation concerning sources of evidence.*

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

"(2) * * *

"(3) * * *

"(b) As used in this section 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section 2510 (5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

(Pub. L. 91-452, Title VII, Oct. 15, 1970, 84 Stat. 935.)

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No. 82-36

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARMON WESLEY SHIELDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment or 18 U.S.C. (& Supp. IV) 2511 was violated where petitioner's conversation with a co-defendant was recorded with the co-defendant's consent.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Hoffa v. *United States*, 385 U.S. 293 7

Lewis v. *United States*, 385 U.S. 206 7

Lopez v. *United States*, 373 U.S. 427 ..... 6, 7

On Lee v. *United States*, 343 U.S. 747 7

Rakas v. *Illinois*, 439 U.S. 128 8

United States v. *Caceres*, 440 U.S. 741 ..... 6, 7

United States v. *Craig*, 575 F. 2d 455, cert. denied, 439 U.S. 820 7

United States v. *Howell*, 664 F. 2d 101, cert. denied, No. 81-6185 (Mar. 8, 1982) 7

United States v. *Rich*, 518 F. 2d 980 7

United States v. *Tousant*, 619 F. 2d 810 7

United States v. *White*, 401 U.S. 745 ..... 6, 7

Walter v. *United States*, 447 U.S. 649 ..... 7, 8

Constitution and statutes:

United States Constitution, Fourth Amendment 4, 5, 7, 8

Page

Constitution and statutes—Continued:

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. (& Supp. IV) 2510-2520 ..... 4, 5

18 U.S.C. 2510(4) 6
18 U.S.C. 2511(1) 7
18 U.S.C. 2511(1)(c) 7
18 U.S.C. 2511(2)(c) 5, 7
18 U.S.C. 2511(2)(d) 7
18 U.S.C. 2515 7

18 U.S.C. 1951 1

18 U.S.C. 1952 1

18 U.S.C. 4205(b)(1) 2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 675 F. 2d 1152.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1982. The petition for a writ of certiorari was filed on July 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiracy to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951 (Count 1), and of two counts of attempting to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951 and 1952 (Counts 2 and 3). He was sentenced to three concurrent

five-year terms of imprisonment and was fined $10,000 on each count (Pet. App. 1a-2a).[1] The court of appeals affirmed (Pet. App. 3a-4a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4a-8a). The evidence showed that, while he was Executive Director of the Florida Department of Natural Resources, petitioner conspired with Jack Quick, a real estate broker, to extort money from another broker, Bruce McIver. In 1978, McIver attempted to sell two large parcels of land to the State of Florida under the state's Environmentally Endangered Lands Program. One tract was known as "Seminole Ranch" and the other as "Big Talbot Long Island." Before the State could purchase land under this program, Florida's Interagency Advisory Committee ("IAC") was required to recommend the purchase to the Governor and his cabinet. Petitioner was chairman of the IAC and had considerable influence with respect to such recommendations (Pet. App. 4a).

In March 1978, McIver had spoken to Quick and requested that petitioner recommend him as a broker to the owners of the Seminole Ranch property. Quick arranged for McIver to meet with petitioner, and the latter agreed to help McIver. A few weeks later, McIver agreed to pay Quick a commission of $100,000 if McIver obtained the right to act as broker for the sale of the Seminole Ranch tract. In May, McIver obtained that right. He stood to make a commission of $600,000 if the sale were completed. Petitioner then instructed his deputy in the Department of Natural Resources to recommend to the IAC on behalf of the Department that the State purchase the Seminole

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[1] Pursuant to 18 U.S.C. 4205(b)(1), the court also provided that petitioner will become eligible for parole after serving a minimum term of one year's imprisonment.

Ranch property. In August, the IAC met and voted to recommend the purchase (7 R. 179-181; 8 R. 14-19, 24-26).[2]

In September, the Governor and the cabinet accepted the IAC's recommendation. Shortly thereafter, Quick informed McIver that he wanted half of McIver's commission. When McIver resisted, Quick warned him that unless he complied petitioner would stop the sale. Quick also told McIver that petitioner had said that McIver's other project, the sale of Big Talbot Long Island, was "dead." During the next two weeks, Quick met repeatedly with McIver in an attempt to extort a payment for him. He told McIver that petitioner wanted $200,000 when the Seminole Ranch was purchased and $35,000 when Big Talbot Long Island was acquired (8 R. 27-28). In November, McIver indicated to Quick that he would accede to his demands. In December, the IAC met and voted to recommend that the State purchase Big Talbot Long Island (8 R. 36-40).

Petitioner and Quick never succeeded in obtaining money from McIver. In January 1979, Florida newspapers reported that the FBI was investigating the attempted extortion of McIver. The State then halted all purchases of land under the Environmentally Endangered Lands Program (8 R. 42-43).

2. Prior to trial, petitioner moved to suppress evidence of tape recordings of three conversations in which he and Quick had discussed their attempt to extort money from McIver (Pet. App. 8a). The circumstances surrounding the tape recording of these conversations were as follows: In October 1978, Quick asked a private investigator, Gene Andrews, to assist him in tape recording his conversations

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[2] "R." refers to the record in the court of appeals. "S. Tr." refers to the transcript of a hearing on petitioner's motion to suppress, held in April 15, 1980 in the United States District Court for the Middle District of Florida. That transcript was made part of the record in this case.

with petitioner. Quick wanted a record to ensure that petitioner would live up to his agreements concerning the McIver transactions, and he also wanted to be able to blackmail petitioner to participate in future corrupt land deals. After telling Quick that he could probably assist him, Andrews reported Quick's request to the Federal Bureau of Investigation (S. Tr. 13-17; 9 R. 52-53, 57-59; 10 R. 11).

In November 1978, the FBI gave Andrews a body recorder and a radio transmitter. Andrews went to Quick's office and placed those devices in a concealed position on Quick's body. Andrews told Quick that he would be wearing both a recorder and a radio transmitter so that Andrews would overhear the conversation. When Quick was ready to leave his office for a meeting with petitioner, Andrews turned on the recorder (9 R. 59-62; S. Tr. 20-22). Quick then proceeded alone to petitioner's office, and the ensuing conversation was recorded on tape. When Quick returned to his own office, Andrews turned off the recorder and the transmitter. He then returned the equipment to the FBI (9 R. 62; 10 R. 15). Similar recordings were made on two subsequent dates. On all three occasions, FBI agents listened to radio transmissions of the conversations (10 R. 13-20, 39-49; S. Tr. 24-32, 105-119, 136-143).

In moving to suppress the tape recorded conversations, petitioner contended that the government had violated the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. IV) 2510-2520, because a warrant authorizing interception of the conversations had not been obtained. The court of appeals held (Pet. App. 12a-16a) that the recordings did not violate the Fourth Amendment because they were made with the consent of one of the participants. The court also held that the FBI agents were not required to obtain a warrant before listening to the tapes furnished by Andrews (*id.* at 14a-16a).

The court held (Pet. App. 8a-11a) that Title III had not been violated because under 18 U.S.C. 2511(2)(c), it is not unlawful "for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or with a decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 5-6) that the tape recording and transmission of his conversations violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. However, those interceptions were plainly lawful under 18 U.S.C. 2511(2)(c), a provision of Title III which permits the electronic interception of private conversations by persons "acting under color of law" when one of the parties to the conversation has given his consent.

a. Petitioner argues (Pet. 5-6) that 18 U.S.C. 2511(2)(c) is inapplicable because Quick did not know that Andrews was cooperating with the FBI and thus "did not consent to the F.B.I.'s interception of his conversations." Petitioner's argument is frivolous. By its terms, 18 U.S.C. 2511(2)(c) merely requires that consent for the interception be given by a party to the conversation, not that the party have knowledge that the person making the interception is cooperating with the government. Petitioner cites no authority for the novel proposition that such knowledge is required. Moreover, it is apparent that 18 U.S.C. 2511(2)(c) was drafted to permit the consensual monitoring of conversations where permitted by the Fourth Amendment. This Court has held that it is constitutional to intercept a conversation with the

consent of one of the participants because no "constitutionally justifiable expectation of privacy" is violated (*United States* v. *Caceres*, 440 U.S. 741, 751 (1979), quoting *United States* v. *White*, 401 U.S. 745, 751 (1971) (opinion of White, J.)). The Court has reasoned that a participant could have testified concerning the conversation and that to bar the recording of the conversation would therefore be to say that another party to the conversation "has a constitutional right to rely on possible flaws in the [consenting participant's] memory, or to challenge [his] credibility without being beset by corroborating evidence that is not susceptible of impeachment." *Lopez* v. *United States*, 373 U.S. 427, 439 (1963). This reasoning is equally applicable whether or not the participant who consents to the interception knows that the person making the interception is cooperating with authorities. In either event, the nonconsenting participant's legitimate expectation of privacy is precisely the same.

b. Petitioner also argues (Pet. 5-6; see also Pet. App. 9a-10a) that Quick, not Andrews, tape recorded the conversation and that Quick was not acting "under color of law" because he was unaware of Andrews' cooperation with the FBI. This argument is clearly invalid as well.

The term "intercept" is defined by 18 U.S.C. 2510(4) to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Accordingly, it is apparent that the conversations in question were intercepted both by Quick (who wore the body recorder and transmitter) and Andrews (who attached the electronic devices to Quick and turned them on and off), as well as the FBI agents who listened to those conversations on radios. Thus, for purposes of this particular contention, it is irrelevant whether Quick was acting "under color of law" or whether his

actions were illegal (see 18 U.S.C. 2511(1), (2)(d) (participant may not intercept conversations for criminal or tortious purposes)). Andrews[3] and the agents were acting "under color of law", and their interceptions were lawful under 18 U.S.C. 2511(2)(c). Consequently, the contents of the conversations they intercepted could lawfully be received in evidence. See 18 U.S.C. 2515 (intercepted communications may not be admitted in evidence if disclosure is unlawful); 18 U.S.C. 2511(1)(c) (disclosure of intercepted communications unlawful if person making disclosure knows or has reason to know that communication was illegally intercepted).

2. Petitioner also contends (Pet. 6-7) that his Fourth Amendment rights were violated by the recording and transmission of his conversations. As noted, however, this Court has consistently held that the Fourth Amendment does not prohibit the recording or transmission of a conversation so long as one of the parties consents. *United States* v. *Caceres, supra; United States* v. *White, supra; Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952).

Petitioner's reliance (Pet. 6) on *Walter* v. *United States*, 447 U.S. 649 (1980), is misplaced. There, boxes containing obscene films were mistakenly delivered to a private party, who examined their contents and then gave them to the FBI without screening the films. The FBI later screened the films

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[3]The courts of appeals have consistently held that private citizens are acting "under color of law" within the meaning of 18 U.S.C. 2511(2)(c) when they intercept conversations at the request of or in cooperation with government investigators. See, *e.g.*, *United States* v. *Howell*, 664 F. 2d 101, 104-105 (5th Cir. 1981), cert. denied, No. 81-6185 (Mar. 8, 1982); *United States* v. *Tousant*, 619 F. 2d 810, 813 (9th Cir. 1980); *United States* v. *Craig*, 573 F. 2d 455, 474 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); *United States* v. *Rich*, 518 F. 2d 980, 985 (8th Cir. 1975).

without obtaining a warrant. The Court held that the Fourth Amendment was violated because the screening of the films constituted a separate search, and no exception to the warrant requirement was applicable.

The tapes in this case are not at all comparable to the films in *Walter*. The films were the property of the defendants in *Walter*, not the private party to whom they were mistakenly delivered. Thus, the private party could not authorize the government to search the films, and the FBI's subsequent warrantless search violated the defendants' rights. Here, the tapes were not petitioner's property. As the court of appeals correctly concluded (Pet. App. 16a), Andrews' interest in the tape was "sufficient to enable him to authorize the [FBI agents to listen] to the recorded conversations." "He had recorded the conversation, and had purportedly taken the original tape with Quick's consent to make copies. Furthermore, Quick knew that Andrews had retained his own tape * * *." (Pet. App. 15a-16a). Moreover, even if the tape belonged to Quick rather than Andrews, a subsequent search would not have violated petitioner's rights. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978). Compare, *Walter* v. *United States, supra*, 447 U.S. at 658 (opinion of Stevens, J.); *id.* at 662 (opinion of White, J.).

Furthermore, there was no separate search in this case when the agents played the tape furnished by Andrews. They merely heard once again what had been transmitted over the radio and what Andrews had heard first-hand. Compare *Walter* v. *United States, supra*, 447 U.S. at 656-660 (opinion of Stevens, J.); *id.* at 661 (opinion of White, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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